for The Defense

Volume 9, Issue 5 ~ ~ May 1999

The Training Newsletter for the Maricopa County Public Defender's Office ⋈ Dean Trebesch, Maricopa County Public Defender

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CROSS-EXAMINATION AND THE DOCTRINE OF INVITED ERROR

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The right of cross-examination is an essential part of the right of confrontation guaranteed by both the United States Constitution and the Arizona Constitution. Carefully used it is an invaluable tool for developing the theory of defense. Carelessly used it may result in otherwise inadmissible testimony being admitted that may significantly undermine the theory of defense, and result in the conviction that the prosecutor's direct examination has failed to achieve.

A poorly planned cross-examination or poorly executed cross-examination may result in the admission of otherwise inadmissible testimony through the doctrine of invited error, also know as "opening the door". Simply stated,

> The invited error doctrine applies to situations "where evidence adduced or comments made by one party make otherwise irrelevant evidence highly relevant or require some response or rebuttal." (Citation omitted). The doctrine prevents a defendant from introducing forbidden evidence and then seeking reversal based on its erroneous introduction.[1]

Cross-Examine Consistent With the Theory of Defense and Respect the Witness's Abilities

Invocation of the invited error doctrine often occurs when defense counsel carelessly questions a witness, especially a law enforcement witness, and opens the door to the witness providing otherwise inadmissible

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prejudicial testimony. An excellent example is found in *Stuard*. In *Stuard* defense counsel opened the door to the presentation of otherwise inadmissible testimony about the defendant's prison record through careless questioning of a homicide detective.

Detective Chambers--now retired--was the detective. Detective Chambers was an experienced, wily witness, with a country boy manner that could easily cause a defense attorney to underestimate him. I suspect that this was what occurred in *Stuard:*

> Q. [Defendant's attorney]: And during [the] hour and a half [interview], did you discuss all of the things that you've talked about today, or were other things discussed but just weren't important enough to write down?
>
> A. [Chambers]: I'm sure we discussed other things that aren't in the report. *[The trap is set with a vague answer].*
>
> Q. [Defendant's attorney]: What other things would you have discussed? *[Defense counsel's curiosity is piqued].*
>
> A. [Chambers]: Well, I recall we discussed, or attempted to discuss *his having been in prison*. He would confirm that he had. [Defense counsel reaps the reward of his curiosity].[2]

"Defense counsel, cross-examining a law enforcement witness, should proceed as if the witness is a courtroom tested, wily witness, chomping at the bit to unleash normally inadmissible prejudicial testimony, if only defense counsel will provide the invitation."

The Arizona Supreme Court, agreeing with the trial judge's decision denying the motion for mistrial, noted that defense counsel knew from the pre-trial voluntariness hearing that Detective Chambers had learned of the defendant's criminal record during his post-arrest interview. The Court concluded that "[g]iven this pre-trial testimony, defense counsel's question squarely and directly invited Chambers to reiterate his prior testimony."[3] The Court also rejected the defendant's argument that because of Detective Chambers' extensive experience any culpability for the inadmissible response must lie with the detective, who should have know such testimony is generally inadmissible. The Court rejected this argument with the statement that "an able lawyer conducting cross-examination can usually avoid the injection of known inadmissible testimony by using narrow, leading questions."[4]

Knowing what he knew, what purpose could defense counsel have had to ask such a broad question, of an experienced homicide detective? How could the response to defense counsel's question further the theory of defense?

Defense counsel, cross-examining a law enforcement witness, should proceed as if the witness is a courtroom tested, wily witness, chomping at the bit to unleash normally inadmissible prejudicial testimony, if only defense counsel will provide the invitation. Defense counsel must not be mislead by the witness' appearance or demeanor into providing the invitation. Always keep in mind that the law enforcement witness, whether he or she is an officer or scientific witness, has probably been cross-examined more often than defense counsel has conducted cross-examination.

The witness does not have to be a law enforcement witness, however, in order to burn careless defense counsel who asks a poorly chosen question. An example of a non-law enforcement witness trapping defense counsel is found in *State v. Wilson.*[5] The witness was Rex Parsons, a highly intelligent and crafty man, who unfortunately used his talents to commit white collar crimes.[6]

Defendants Wilson and Kerekes were charged with second degree conspiracy and fraudulent scheme and

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artifice involving the sale of fruit juice machines. The state's theory of the case was that the defendants, and Rex Parsons, created a company to promote the sale of fruit juice machines, intending to deliver only a few machines to establish a track record, and then to take off with the money of the subsequent purchasers. The defendants, on the other hand, contended that the business was a legitimate one, and that the non-delivery of machines to persons who had ordered them was the result of the business failing because of civil litigation that froze the assets of the company.[7]

Mr. Parsons during cross-examination by defense counsel for Mr. Kerekes offered the following prejudicial, and normally inadmissible, testimony:

> Q. Now, in fact, when you first started up you got at least a hundred cases of juice substantially cheaper than the price you were paying for that juice there, is that not correct?
>
> A. When you say substantially you mean free? [*Nice set up question in response to a question].*
>
> Q. No. At about $2.00 a case?
>
> A. We bought stolen juice at a real good price?[8] [*Otherwise inadmissible testimony now before the jury].*

"Failure to ask narrow questions focused on the theory of defense and failure to respect the abilities of the witness resulted in normally inadmissible testimony being admitted under the invited error doctrine."

The Court of Appeals found this error was invited because Mr. Parsons' answer was in direct response to questioning by defense counsel. The appellate court also agreed with the trial court "that defense counsel should have been aware that he was on dangerous ground in pursuing this line of questioning[.]"[9] Careless questioning and the invited error doctrine allowed this normally inadmissible testimony to be considered by the jury.

Failure to ask narrow questions focused on the theory of defense and failure to respect the abilities of the witness resulted in normally inadmissible testimony being admitted under the invited error doctrine in *Stuard* and *Wilson*.

Avoid Cross-Examination That is Overreaching

Invocation of the invited error doctrine also can occur when defense counsel, having gained favorable strategic advantage through a pretrial ruling, or having gained favorable testimony during cross-examination, seeks to add to his or her gains by taking unfair advantage of the ruling or the testimony by overreaching. Overreaching by defense counsel opens the door to the use of otherwise inadmissible prejudicial testimony to counter the overreaching conduct.

An example of overreaching resulting from a favorable pre-trial ruling is found in *State v. Roberts*.[10] Prior to trial, defense counsel successfully moved *in limine* to preclude a state's witness from making reference to the witness' offer to take a lie detector test in reaction to being initially identified by the victim as being the assailant. Having won the sought after ruling, defense counsel then attempted to take unfair advantage of this ruling by questioning the witness at trial about his reaction to having been identified in the live lineup by the victim. Defense counsel knew that the witness had been warned against mentioning the offer to take a lie detector test. The witness answered that he did not remember what his reaction was. Under these circumstances the trial court permitted the witness to testify on re-direct "that he, 'couldn't believe it', and offered to take a lie-detector test."[11] The Court of Appeals held that because the testimony about "the offer to take a polygraph examination was elicited through defense counsel, the error, if any, was invited."[12]

Roberts presents a clear case of overreaching. Defense counsel had achieved a strategic pre-trial victory with the granting of the motion *in limine*. He then tried to take unfair advantage of the witness who was the subject of the ruling. No trial judge will allow this to go uncorrected. The result is that a tactical evidentiary advantage obtained through aggressive motion practice is lost.

Another example of overreaching is found in *State v. Kemp*.[13] Mr. Kemp and Mr. Logan were charged with the murder of Hector Juarez. Their trials were severed with Mr. Logan being tried first and convicted. During the state's case-in-chief in Mr. Kemp's trial, a police detective testified on direct examination about some of Mr. Kemp's admissions concerning his activities and association with Mr. Logan before the murder. During "cross-examination defense counsel elicited answers that all of the *physical* evidence, with the exception of the 'fuzzy' ATM photograph, implicated Logan but not Kemp."[14] Defense counsel, not satisfied with this important concession, ventured on:

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Q: There is *no evidence* that Kemp had possession of the gun that killed Hector [Juarez] at any time after the purchase?

A: No.

Q: And in fact, the *only evidence* you have got of what happened to that gun is it was used to kill Hector and Jeff Logan had it; *no evidence* Thomas Kemp was in the Siverbell Mines area that night, is there?

A: No

Q: There is *no evidence* that Thomas Kemp knew?

A: No.

Q: There is *no evidence* that Thomas Kemp was at the scene where the body was found at all?

A: No.[15]

Did you note that defense counsel cleverly switched from his initial questioning about the lack of *physical evidence* to the lack of *any evidence?* The prosecutor and the trial judge noticed. So, on re-direct examination the state was permitted to question the detective about his interrogation of Mr. Logan to rebut the inference created by defense counsel that *no evidence* connected Mr. Kemp to the murder. The detective was permitted to testify that Mr. Logan had told him what happened to Mr. Juarez [the murder victim], and what he and Mr. Kemp were doing the night Mr. Juarez disappeared.[16]

"Cross-examination of each witness must be planned in the context of the cross-examination of all of the other state's witnesses."

The Arizona Supreme Court rejected Mr. Kemp's argument that this testimony was inadmissible hearsay. The Court wrote:

> Kemp's question on cross-examination created an inference that no evidence connected him to Juarez's killing. In fact, there was evidence, Logan's statements, connecting Kemp to the murder scene. Kemp, of course, is entitled to comment on the strength of the state's case against him. If Kemp's defense counsel had asserted that all of the *physical* evidence inculpated Logan but not Kemp, or otherwise limited his inquiry, no improper inference would have been raised. Kemp's counsel went beyond this. He left the jury with the impression that no evidence connected Kemp to the murder.[17]

The Court concluded that Kemp's defense counsel "invited error with his cross-examination[,] . . . [b]y asserting the non-existence of evidence connecting Kemp to the murder, defense counsel cannot now claim error occurred by meeting the assertion with contrary proof."[18]

Defense counsel's overreaching in *Roberts* and in *Kemp* resulted in otherwise inadmissible testimony being admitted through application of the invited error doctrine.

Cross-Examination of Witnesses Must be Coordinated

Cross-examination of each witness must be planned in the context of the cross-examination of all of the other state's witnesses. Failure to do so may result in an apparently successful cross-examination of one witness opening the door to normally inadmissible and disastrous testimony by another witness. An example of this type mistake is found in *State v. Woratzeck.*[19] Mr. Woratzeck was charged with burglary of a residential structure, robbery and the killing of Linda Leslie, a 36-year-old woman who suffered from Huntington's disease and had the mental capacity of a 15-year-old. She lived in a shed that she rented from Mr. Woratzeck.[20]

At trial, defense counsel asked witness Roy Vaughn, who had helped care for Linda, whether he knew if someone had threatened to come and get her if she reported a certain incident to the police. Mr. Vaughn testified that he had heard about this from Linda, but he didn't know of whom she was speaking. Defense counsel then asked Mr. Vaughn if he knew why someone had threatened Linda. He answered that it was because that person had robbed and raped Linda.[21] Apparently defense counsel hoped by eliciting this testimony to cast the blame for Linda's death on this other unknown person who had robbed and raped Linda.

Defense counsel's cross-examination of Mr. Vaughn failed to take into account the testimony of the

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state's next witness, Neva Vaughn. Ms. Vaughn, who had also helped care for Linda, testified that she heard about the rape and robbery from Linda and that Linda had told her that her landlord [Mr. Woratzeck] had done it.[22]

The Arizona Supreme Court rejected Mr. Woratzeck's argument that his sixth amendment right to confront witnesses against him was violated by the trial judge's admission of the alleged hearsay testimony. The Court found that "not only did defense counsel fail to object to the testimony, he opened the door to the inquiry about the defendant's involvement in the rape-robbery incident by introducing and developing the topic on examination of Roy Vaughn."[23]

Failure to prepare the cross-examination of Mr. Vaughn within the context of the expected testimony of Ms. Vaughn opened the door under the invited error doctrine to the otherwise inadmissible hearsay testimony of the unrelated rape-robbery incident.

Conclusion

Trial counsel conducting cross-examination must always keep in mind the doctrine of invited error. The likelihood of error being invited can be minimized if the cross-examination is conducted with a few simple principles kept in mind: (1) Ask only questions that will provide responses that can be used to support the theory of defense; (2) Respect the ability of the witness being cross-examined; (3) Do not try to take unfair advantage of a favorable ruling or favorable testimony by overreaching; and (4) Plan your cross-examination of each witness in the context of all of the witnesses. ■

"The Juvenile Drug Court is designed to place the various components of the criminal justice and substance abuse treatment systems together to try and use the coercive power of the court to promote abstinence and pro-social behavior."

1. *State v. Stuard*, 176 Ariz. 589, 600, 863 P.2d 881, 892 (1993).
2. 176 Ariz. at 600, 863 P.2d at 892.
3. 176 Ariz. at 601, 863 P.2d at 893.
4. *Id.*, 863 P.2d at 893.
5. 134 Ariz. 551, 658 P.2d 204 (App. 1982).
6. I make this judgment of his abilities based upon my having represented Mr. Parsons.
7. *Id.*., at 553-554, 658 P.2d 206-207.
8. *Id.*, at 556, 658 P.2d at 209.
9. *Id.*, 658 P.2d at 209.
10. 144 Ariz. 572, 575, 698 P.2d 1291, 1294 (App. 1985).
11. *Id.*, 698 P.2d at 1294.
12. *Id.*, 698 P.2d at 1294.
13. 185 Ariz. 52, 912 P.2d 1281 (1996).
14. (*Emphasis Added*). *Id.*, at 60, 912 P.2d at 1289.
15. *Id.*, 912 P.2d at 1289.
16. *Id.*, 912 P.2d at 1289.
17. *Id.*, 912 P.2d at 1289.
18. *Id.*, at 60-61, 912 P.2d at 1289-1290.
19. 134 Ariz. 452, 657 P.2d 865 (1982).
20. *Id.*, at 453, 657 P.2d at 866.
21. *Id.*, at 454, 657 P.2d at 867.
22. *Id.*, 657 P.2d at 867.
23. *Id.*, 657 P.2d at 867.

JUVENILE DRUG COURT: A MODEL FOR JUVENILE COURT?

By Vicki Liszewski and Jason Leonard
Deputy Public Defenders - Juvenile

On January 13, 1999, the Southeast Facility in Mesa held its first drug court. It became one of the nearly 100 planned or operating juvenile drug courts in the United States. The Juvenile Drug Court is a comprehensive and coordinated court-based rehabilitative effort for substance abusing probationers. Juveniles from four zip code zones are sentenced to drug court as a term of their probation. It is not a diversion program. Many of the juveniles in the program have failed at both standard and/or intensive probation because of their continued drug use and the next step for them would be commitment to the Arizona Department of Juvenile Corrections. The Juvenile Drug Court is designed to place the various components of the criminal justice and substance abuse treatment systems together to try and use the coercive power of the court to promote abstinence and pro-social behavior.

Drug Court Eligibility

A probation officer or judicial officer may request that a juvenile be screened for drug court eligibility. The juvenile must live in one of four designated zip code areas and be between the ages of 13 and 16.5 at the time of adjudication. Suicidal juveniles, psychotic juveniles, sex offenders and juveniles who are below the fifth grade level cognitively are excluded. Also, some juveniles referred for violent offenses may be excluded based on the circumstances of their cases. Once it is determined that a

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juvenile is eligible for drug court, the disposition (sentencing) is set before the judge presiding in drug court and after consultation with the drug court team, the juvenile is placed (or not) into drug court. The drug court team consists of a judge, county attorney, public defender, private defense counsel, two probation officers and counselors.

As part of their drug court sentence, juveniles are required to appear in court one time per week during phase one of the program and are given 180 days of deferred detention. If the juvenile submits dirty UA's or otherwise behaves inappropriately, they will serve time. The juvenile must also complete 360 hours of community service, attend counseling sessions weekly and submit three UA's per week. The SEF Drug Court team implemented a point system for the community service hours. The juvenile is given credit for one hour of community service for submitting clean UA's, participating in group counseling, attending school, coming to court and attending AA or NA meetings. Once a juvenile has 12 consecutive clean UA's and has accumulated at least 104 points, they are is promoted to phase two. Phase two requires court attendance every other week and twice-weekly UA's rather than three times per week. Phases three and four require less stringent court appearances, fewer UA's and an after-care program.

The benefit to our clients is two-fold. First, since relapses are expected, an immediate consequence can be given without a probation violation being filed by the County Attorney's Office. A juvenile who is not in drug court could expect one or more probation violations to appear on his/her profile. Second, more intensive or different programming can be immediately implemented, tailored to the particular circumstances surrounding the juvenile and their family. Juveniles who are subject to regular probation and who are having problems would quite possibly have to wait several months before these services could be provided.

"However, the juvenile drug court population presents challenges that are in many ways more complex than those arising in the adult arena. Their needs are different, and often more difficult to address."

Juvenile Drug Court v. Adult Drug Court

The Juvenile Drug Court differs from the Adult Drug Court Model even though there is a natural, and seemingly reasonable, tendency to adapt existing adult court principles to juvenile court systems. To a degree, the two share some common goals and characteristics, as do the offenders who come before them. However, the juvenile drug court population presents challenges that are in many ways more complex than those arising in the adult arena. Their needs are different, and often more difficult to address. A juvenile's beliefs and value systems differ from an adults, and fear of the consequences of their actions is often non-existent.

Practitioners have identified several key differences between the populations and circumstances of adult and juvenile courts. Among them are the following:

1. The drugs of choice differ, as is the nature of drug involvement.
2. Family issues become a primary focus in juvenile drug court
3. School issues replace work and training issues in the juvenile drug court environment.
4. The fear of loss or punishment is often a key factor in adult rehabilitation. With less to lose and fewer sanctions, juveniles don't share these fears, or the motivation to change.
5. Juveniles simply do not recognize their actions to be wrong.

Should the Juvenile Drug Court Model Be Implemented as a Model for All Probationers Involved in the Juvenile Justice System?

With the ever-increasing focus on illegal drug use in this country, society must look for numerous ways to control the problem. Harsher sentences have been and are being tried, unsuccessfully. As a result, the focus has shifted back to a treatment model. Nowhere is this more evident than in the juvenile justice system. Around the country, drug courts are proliferating. While they all may have different procedures and nomenclature, the purpose is the same -- get the person off drugs and out of the criminal justice system. By using the previously mentioned harsher sanctions as a hammer held over the person, the court utilizes many community based services to "force" the person into drug treatment. Since the inception of the first drug court in Dade County, Florida almost ten years ago, many studies have shown that drug courts are effective in lowering the relapse and recidivism rates.

With the success of the adult drug court programs, it seems only natural that we have now applied the drug court model to children. The results of initial

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studies seem favorable. But, there are a few questions that must be addressed before we can declare our newly created drug court a success and begin expanding it to more than the few children it now serves.

Is Drug Court an Effective Use of Limited Resources?

The first evidence seems to support the proposition that juvenile drug courts may be every bit as effective as the adult drug courts. In other juvenile drug courts around the country, the response from practitioners and participants has been positive. There are many individual components in the juvenile drug court model which might be effective by themselves, and, in combination, may prove to be highly successful for the children. The most important components are the counseling, positive reinforcement, and high level of supervision.

However, it appears that the most important of these components is the counseling. Numerous studies have shown that drug counseling has been very effective in reducing both drug use and criminality. Recently, the National Treatment Improvement Evaluation Study (NTIES) sampled numerous treatment programs and found that, for women, drug use was down 40% one year after participating in treatment. In young adults, the results were even more compelling. Depending upon drug of choice, treatment dropped drug usage between 45% and 51%. The treatment also reduced criminal activity in the patients by 49%.

"If the drug court model rehabilitates, maybe we should be looking more closely at this model as a model for the juvenile system at large."

Since the drug court model is based on rehabilitation, and the focus of the juvenile justice system is also rehabilitation, it seems as though the model may be redundant. If the drug court model rehabilitates, maybe we should be looking more closely at this model as a model for the juvenile system at large. Drugs play a role in the lives of most of the children we see in court on a daily basis. As of this writing, there were 5,594 children in the Maricopa County Juvenile Justice System. The small number of children in the Juvenile Drug Court represent only about .3% of all the children under supervision. If the Juvenile Drug Court Model works, and the evidence does support such a conclusion, then quite possibly it should be used as a model to benefit the other 99.7% of the children in the system. ■

THE DUTY OF COUNSEL TO ADVOCATE FOR CLIENT ACCEPTANCE OF PLEA BARGAINS

By Edward F. McGee
Deputy Public Defender - Appeals

In the present climate of mandatory sentencing and "truth" in sentencing, many prosecuting agencies have decided to turn the screw yet again by placing restrictions on plea bargaining. Examples include barring defense interviews of crime victims, conditioning offers on the agreement of defense counsel to file no pretrial motions, limiting charge or sentencing bargains to a "single benefit," or imposing plea cutoff deadlines. These disagreeable practices have caused defense lawyers to conclude that the plea bargaining process is often a waste of time and that the satisfaction to a defendant of having "gone down swinging" may outweigh the slight benefits offered by the state. A recent article in this very publication advocated this approach.[1] What is worrisome, however, is the conclusion of some commentators that in persuading a client to plead out, the lawyer is substituting his will for that of the defendant and that this may constitute a corrupt and immoral act. This, reportedly, is the philosophy of Judy Clarke, counsel for the "Unabomber," Ted Kaczynski, who, as we all know, copped a plea.

This article will summarize the obligations of counsel to present and explain the government's offer, and will explore recent case law holding that there exists a duty for counsel to advocate for his client's acceptance of a plea bargain, even when the client insists he will accept no offer.

The duties of counsel, prior to pleading a client guilty, are set forth comprehensively in the ABA Standards for Criminal Justice, Chapter 4: the Defense Function.[2] Reduced to their essence, the Standards require that in dealing with a single client,[3] counsel should:

1) Explore non-trial disposition of the defendant's case, as through diversion;[4]

2) Keep the defendant advised of the progress of plea negotiations;[5]

3) Promptly communicate and explain all significant proposals made by the prosecutor;[6]

4) Refrain from recommending acceptance of a plea until counsel has become appropriately familiar with the facts and applicable law;[7]

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5) Candidly advise a defendant of his prospects, both by plea and at trial;[8]

6) Refrain from over or understating the risks, hazards or prospects so as to exert undue influence on the defendant's decision to plead;[9] and

7) Leave for the defendant, after full consultation, the decision whether to accept the plea agreement.[10]

These standards were the product of decades, if not centuries, of philosophizing about the role of counsel.[11] Since their creation, however, we have seen develop a concern with victims' rights and an obsession with speedy disposition which has reduced many of these standards to little more than *desiderata*.[12]

Into this mix, the Second Circuit has now injected an additional agreement: the requirement that in a serious case, with no plausible defense, counsel must affirmatively advocate for client acceptance of the state's offer. In *Boria v. Keane*,[13] the Second Circuit granted habeas relief to a defendant who had insisted on trial because he could not bear the humiliation of having his children hear him admit to narcotics offenses. The Second Circuit found defense counsel ineffective for allowing his client to reject the government's offer without having given him any advice on the wisdom of doing so. The *Boria* court looked to EC 7-7 of the ABA Model Code of Professional Responsibility (1992) which provides that:

> A defense lawyer in a criminal case has the duty to advise his client fully on *whether a particular plea to a charge appears to be desirable*. (Emphasis added [by the Court of Appeals])

The *Boria* court also quoted approvingly from Anthony G. Amsterdam in TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES (1988) in which the author observes:

> The decision whether to plead guilty or contest a criminal charge is ordinarily the most important single decision in any criminal case. This decision must ultimately be left to the client's wishes. Counsel cannot plead a client guilty, against the client's will. [citation omitted] But counsel may and *must* give the client *the benefit of counsel's professional advice on this crucial decision*. § 201 at 339 (the word "must" was emphasized by the author; otherwise the emphasis is [that of the Court of Appeals])[14]

Boria does not stand alone. Although there is no Arizona case on the issue, the courts in all other jurisdictions addressing it have held that failure of counsel to advise a client of the adverse consequences of plea bargain rejection is just as ineffective as failure to advise of the consequences of acceptance.[15] In all these cases, the reviewing courts found that failure to advise a defendant of the consequences of rejection met both the "deficient performance" and "actual prejudice" prongs of *Strickland v. Washington*.[16]

The more difficult question for many courts has been what remedy to apply. In *Boria*, the Second Circuit ordered the conviction to stand, but released the defendant from prison due to New York state court procedural peculiarities and the fact that the defendant had already served twice as much time as the original plea offer contemplated. In cases where defendants have, through the incompetence of earlier counsel, been forced to accept unfavorable plea terms with subsequent counsel, some courts have ordered resentencings, presumably to give effect to the earlier offer.[17] *In re Alvernaz*,[18] however, was a case where the defendant had gone to trial after rejecting an offer, and it took a different tack. There, because the defendant had never unequivocally indicated that he would have accepted the offer if counsel had recommended it, the California Supreme Court offered the state options: it could either take the defendant to trial again, or re-extend the original plea offer.

"In cases where defendants have, through the incompetence of earlier counsel, been forced to accept unfavorable plea terms with subsequent counsel, some courts have ordered resentencings, presumably to give effect to the earlier offer."

No appellate decision involving a failure to advocate for plea acceptance has come to the author's attention in which a defendant serving a substantial sentence has had a higher court vacate a conviction and order specific performance, requiring the prosecution to completely re-extend the original offer. That, however, was the remedy ordered in *United States v. Blaylock*,[19] a decision in which counsel had failed to communicate any offer at all, and in the situation where counsel has failed to "talk turkey" to his client, it can be fairly argued that no offer was ever effectively communicated in the sense contemplated by the ABA Standards and related case law.

For trial counsel, failure to bring all his experience and knowledge to bear in directing the

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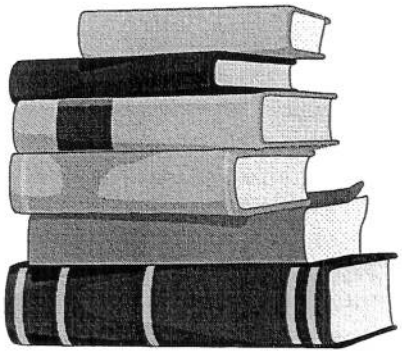
defendant to accept a plea offer can have serious implications. The author is aware of two matters in the past two years in Maricopa County where such a claim has been prosecuted in Rule 32 post-conviction relief proceedings. One case was a first degree murder prosecution where the defendant claimed that his lawyer had not adequately explained the offer. The other case was a child molesting prosecution in which the defendant asserted that his lawyer was chronically intoxicated and that because of this, he had no confidence in his advice that he should take the plea. In the murder case, the trial court set aside the conviction and directed the state to re-extend a plea offer of second degree murder. They did not find that counsel had failed to advocate for plea acceptance, but that he had failed to understand that the offer was not contingent upon acceptance by a codefendant and that he didn't really consider that there was anything viable on the table. In the child molesting prosecution, the claim was disallowed, ostensibly because the trial court was not persuaded that the defendant would have accepted the plea even if his lawyer had not been a drunk. Needless to say, regardless of whether one's client claims his lawyer has not understood that a plea offer was available, or whether his client didn't have confidence in his advice because of his drinking problems or even where counsel simply fails to use all his skill and experience to persuade a defendant of the folly of plea bargain rejection, the result for trial counsel is the same: professional embarrassment, possible bar discipline and theoretically, malpractice liability.[20] Defending against such a claim can also consume a lot of time. Worst of all, perhaps, for the institutional public defender, is reinforcement in the client community of the common suspicion that appointed lawyers are indifferent to the fate of their clients. All of these are things counsel can avoid by the simple expedient of accurately assessing a client's prospects and the value of the plea offer and then presenting the offer to the client in no uncertain terms, if that is the only realistic option the defendant has. Pleading a reluctant client out to a mountain of time in a tough case can be emotionally wrenching and physically exhausting. Trial, in comparison, is easy. Nevertheless, our fiduciary obligation to our clients requires that we do this. Just ask Judy Clarke.[21] ■

"Pleading a reluctant client out to a mountain of time in a tough case can be emotionally wrenching and physically exhausting. Trial, in comparison, is easy."

1. Grant, *Go to Trial*, 9 FOR THE DEFENSE, Issue 1, 4 (1999).
2. ABA Standards for Criminal Justice, Chapter Four: The Defense Function (Approved February 11, 1991).
3. Two standards deal with the responsibility of a lawyer toward other clients, which is a topic beyond the scope of this article. Those standards are 4-6.2(d) [barring concessions favorable to one client which are detrimental to another client in another matter] and 4-6.2(e) [obliging counsel representing multiple clients in the same case to refrain from making aggregated agreements without fully informing each client of the nature of all the claims or pleas and obtaining the consent of each client, presumably as to the entire package].
4. Standard 4-6.1(a).
5. Standard 4-6.2(a).
6. Standard 4-6.2(b). *See also*, *United States v. Blaylock*, 20 F.3d 1458 (9th Cir. 1994).
7. Standard 4-6.1(b).
8. Standard 4-5.1(a).
9. Standard 4-5.1(b)
10. Standard 4-5.2(a)(ii).
11. Cicero wrote extensively to his friend and fellow lawyer, Trebatius, on the duties of lawyers to clients. Wilkin, ETERNAL LAWYER (1947), 235.
12. Consider, for example, the now almost humorous hand-wringing in *State v. Draper*, 162 Ariz. 433, 784 P.2d 259 (1989), where the Arizona Supreme Court intimated that while a plea agreement conditioned upon waiver of a victim interview might not be a *per se* violation of public policy, it could, in certain cases interfere with the defendant's due process right to prepare a defense.
13. *Boria v. Keane*, 99 F.3d 492 (2nd Cir. 1996).
14. *Boria*, *supra*, 99 F.3d at 496-497.
15. *In re Alvernaz*, 2 Cal 4th 924, 934, 830 P.2d 747, 749 8 Cal Rptr.2d 713, 719 (1992); *see also*, *Turner v. Tennessee*, 858 F.2d 1201 (6th Cir. 1988), vacated on other grounds, 492 U.S. 902 (1989), reinstated, 726 F.Supp. 1113, aff'd, 940 F.2d 1000 (6th Cir. 1991), cert. denied, __U.S.__, 112 S. Ct. 915 (1992); and *Lewandowski v. Makel*, 949 F.2d 884 (6th Cir. 1991).
16. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674.
17. *E.g.*, *Carmichael v. United States*, __ F. Supp. __, 1998 LEXIS 20313 (Filed 12-16-98).
18. *In re Alvernaz*, *supra*, 2 Cal.4th 924, 830 P.2d 747, 8 Cal.Rptr.2d 713 (1992).
19. *United States v. Blaylock*, 20 F.3d 1458 (9th Cir. 1994).
20. Malpractice liability, in this context, however, as my colleague James Kemper is wont to point out, is attenuated by the fact that the remedy for criminal malpractice is the granting of post-conviction relief, which corrects the error and minimizes damages, except perhaps for attorney's fees, in the event that the defendant retained counsel to handle his post-conviction relief claim.
21. Ted Kaczynski, who was notoriously insistent on going to trial, has reportedly filed a post-conviction challenge to his guilty plea, asserting that it was coerced. Washington Post, Apr. 26, 1999, Section A, at 2.



VICTIM BIAS: COMMENTING ON THE REFUSAL TO GRANT PRETRIAL INTERVIEWS

By Jeffrey Roth
Deputy Public Defender - Group B

". . . if, in a given case, the victim's state constitutional rights conflict with a defendant's federal constitutional rights to due process and effective cross-examination, the victim's rights must yield." State v. Riggs, 189 Ariz. 327, 330, 942 P.2d 1159, 1162 (1997).

The Victim's Bill of Rights has impaired the defense of criminal cases in many ways, despite the admonition of *Riggs* and other cases. In particular, the victim's right to refuse an interview by defense counsel hinders the defense's ability to fully investigate the case, deprives the accused of a meaningful right of confrontation, discourages settlement, and increases the risk that innocent people will be convicted.

Defense attorneys must work to mitigate the impact of the Victim's Bill of Rights on their clients' rights. The Arizona Supreme Court's decision in *Riggs* may have provided defense counsel with one opportunity to do so. In *Riggs*, the Court held that "the victim has no blanket constitutional right to be free from questioning at trial about the victim's refusal of a pretrial interview." 189 Ariz. 327, 332, 942 P.2d 1159, 1163 (1997). Unfortunately, before we have a chance to finish our first cartwheel, the Court placed an obstacle in our way that seemingly precludes us from ever conducting the very questioning that it allegedly permits. The opinion goes on to state that defense counsel may only pursue this line of cross-examination after a "showing that the victims refused the interviews for a reason or in a manner bearing on their credibility." *Id.* The catch 22, of course, is that we cannot ascertain the reason for the victim's refusal because the victim has refused an interview.

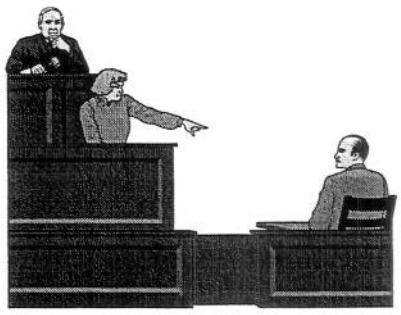
"Justice Feldman's call for "wide latitude" needs to be explored by defense lawyers. Counsel should file motions for pretrial hearings to determine whether victims have refused the pretrial interview because of bias."

An examination of Justice Feldman's dissent, however, may provide some cause for optimism. Justice Feldman acknowledged our dilemma and offered his hope that "trial judges will give defense counsel wide latitude and will broadly interpret the court's foundational requirement . . . ." *Id.* at 335, 942 P.2d at 1167 (Feldman, J., dissenting). He suggests further that "[p]erhaps some offer of proof by way of cross-examination out of the presence of the jury will be necessary to allow counsel to establish that foundation bearing in mind that the lawyer has not had the opportunity to speak to the witness before cross-examination." *Id.*

Justice Feldman's call for "wide latitude" needs to be explored by defense lawyers. Counsel should file motions for pretrial hearings to determine whether victims have refused the pretrial interview because of bias. **A sample motion is included in this issue(p. 21).** The motion argues that a victim's refusal to be interviewed may reveal the victim's bias. Precluding the defense from exploring victim bias violates the accused's Sixth Amendment right of confrontation. In addition, the motion cities heavily from the *Riggs* case itself as well as Judge Kleinschmidt's dissent in the Court of Appeals. See *Riggs*, 186 Ariz. 573, 925 P. 2d 714 (App. 1996) (Kleinschmidt, J., dissenting).

Notably, some judges have granted this motion (although not in my cases). Thus far, two out of three judges in Group B have allowed a hearing outside the presence of the jury. (Judge Gottsfield and Judge O'Toole have granted it; Judge Arellano has twice denied it). At the hearing, defense lawyers should find out how the prosecutor conveyed the defense counsel's requests to interview the victim- e.g., whether they presented the request at all or suggested that it was simply a way for defense lawyers to intimidate them. Furthermore, we should determine the nature of the relationship between the defendant and the victim as well as the strength of the victim's feelings toward the accused. Ultimately, we may want to determine the victim's own explanation for why they refused the interview.

Hopefully, Justice Feldman will remain on the Arizona Supreme Court long enough to allow one of these motions to reach the Court. Good luck with your hearings. ■



THE PLIGHT OF THE JUVENILE SEX OFFENDER

By Peggy Simpson
Client Services Coordinator - Group D

Lately, I have been working on two cases that have been very disturbing to me. I have done considerable research and decided to share my findings. I am by no means finished, but I believe that you can all benefit from what I have learned so far.

The cases of which I speak are juvenile sex offenders. They involved 15 year old boys who were caught by their mothers, "experimenting" with their younger sisters. The mothers' reaction was one of "tough love" I suppose, and they called the police. The boys were automatically transferred to the adult court. Before the cases were resolved, both attorneys fought a terrific battle to make them probation eligible.

"But we create more problems, ruin more lives, and may be creating monsters by scooping all the minnows into the net with the big fish."

My concern for these boys increased as my research seemed to verify that something is terribly wrong here. The boys were traumatized by many months in jail, one has received additional jail time, and both have lifetime probation. Their lives are in danger of total ruin.

The problem is that the boys are labeled as sex offenders and will be treated as such. They will be required to attend counseling and to admit to something to which they cannot relate. Their success on probation depends upon it. While in the juvenile system, they will receive the most appropriate treatment. As they turn 18 however, they will be required to attend adult therapy for sex offenders. If they cannot admit their "deviancy" it will be assumed that they are in "denial" and they will not succeed in therapy.

My research indicates that some young men continue their sexual deviancy but, the majority do not. In the book, *The Juvenile Sex Offender*, by Barbaree, Marshall, and Hudson, (Guilford Press, 1993, p. 46) it states "Although, as we have just indicated, there are juvenile sex offenders who continue their deviant sexual behavior into adulthood, the overall recidivism rates of juveniles are reportedly substantially lower than those of adult offenders. Even though these recidivism data are highly problematic and do not permit cross-study comparisons, they nonetheless suggest that some juvenile sex offenders may desist from assaultive behavior and would not be considered sex offenders as adults." It further states, "It is reasonable to hypothesize that offenders whose sexually coercive behavior desists may differ in substantive ways from those who continue to assault as adults."

Unfortunately, most studies are done on offenders who have committed more violent and long term offenses. Arizona's political climate has resulted in the incarceration and charging of offenders who would not be considered such in most states. According to Lori Scott of the Adult Probation Department, there are currently 37 cases of juvenile sex offenders in the adult system. She mirrors my concerns about treating juvenile sex offenders in the adult system.

Dr. William Marshall of Queens University, author of 140 papers and sex offender therapist for over 15 years in the Canadian Prison System, responded with outrage at my description of the circumstances. Speaking about one of the boys who signed a plea for two years further jail, he stated, "Two years in jail will only frighten, embitter, and corrupt him, then his subsequent behavior will be taken as confirmation of his deviant tendencies rather than the effects of your draft system."

Child molestation is an ugly offense. Irreparable damage is often done to the victims. But we create more problems, ruin more lives, and may be creating monsters by scooping all the minnows into the net with the big fish. Juveniles should be treated in the juvenile system, by those who are prepared to treat them appropriately for inappropriate behavior.

Your continued diligence in pursuing every avenue is so important when dealing with these cases. Become informed and get Client Services Coordinators involved when appropriate. We must become the experts and are obligated to educate the prosecutors and the courts. ■

"MAY I HELP YOU?"

By Amy Bagdol
Support Services Supervisor

When a client asks an attorney if they can help them, the answer is clear: "I'll do everything I can." That clarity of purpose should extend to all levels of our office. Look at it this way, the clients are our customers; lawyering is our product. Last year, 221 lawyers helped 30,000 people directly; support staffers helped 221 lawyers help 30,000 people. Due to the demands of this profession, sometimes "everything I can" isn't enough. So when you hear, "I'm tired," in the elevator, believe it!

I've been around a while, and I've learned a few things. For what it's worth, I would like to share with you some answers that work almost every time. You can use these exchanges all over this office.

"Rolling your eyes, looking put out, or put upon are not a part of 'doing everything I can'".

Q: I need this right away. Can you help me?
A: I'll try.

Q: I don't know what to tell this guy, and he keeps calling.
A: Thank you. I'll talk with him.

Q: Will you go through my minute entries and calendar my court dates?
A: Of course.

Q: I forgot a file. Can you bring it over?
A: Sure. Where are you?

Q: Do you know how to do this?
A: No. But I can find out for you.

Q: Could you hold my calls for a while?
A: Yes. When should I tell your callers to try back?

Q: Who's my lawyer? I need to talk to my lawyer before my preliminary hearing.
A: A team of attorneys is scheduled to appear in that court that day. I could relay a message to one of them, but to be honest with you, it would be best to call us back the day before your hearing to check the status of your case. It may not proceed as planned. It could scratch or vacate at the last minute. So many cases do. (Keep explaining until the caller understands that we are proceeding on his/her behalf. Why our systems are set up the way they are, "police reports are not yet available to us..." "Our office represents you. Is there something we can do for you now?") This always beats: "YOU DON'T HAVE AN ATTORNEY YET." Of course they have an attorney. They have a whole office of them!

Rolling your eyes, looking put out, or put upon are not a part of "doing everything I can". And tantrums are disallowed. (I don't care how young you look!) Customer service is all about how we can get necessary jobs accomplished and has nothing to do with the weak reasoning of why we can't.

Look at the most successful people around you--attorneys and support staff. You can probably count on one hand the number of times they've told you "no" without giving you some alternative plan. Using "no" is fine as long as you follow it with an alternative suggestion that will help accomplish the original request. These people don't ignore you or make you feel small or stupid for asking. They check their voice mail and return their calls. They admit their mistakes and try to fix them. They are polite and knowledgeable. They help the people around them to learn. They don't make petty, disparaging remarks--about anybody. They say things like "yes, sure" and "okay" (a lot). And then they follow-through. They are masters of customer service. We feel better having dealt with them, even when they don't tell us what we want to hear.

This describes the majority of us, the 400 trying to help the 30,000. Naturally, with numbers like these, there is constant pressure to perform, and we may not notice the times when people are helpful. When the pressure is exacerbated because people are less than helpful, it stands out in a big way. So, let me be the first to offer: "May I help you?" Please feel free to call me at 506-8204 or E-mail me if I can help. ■

ARIZONA ADVANCE REPORTS

By Steve Collins
Deputy Public Defender - Appeals

***Mejia v. Irwin*, 289 Ariz. Adv. Rep. 3 (CA 1, 2/16/99)**

Mejia was charged with possession of dangerous drugs for sale, but pled guilty pursuant to a plea agreement to possession of dangerous drugs. He was placed on probation but was later found in violation for again possessing drugs.

A.R.S. § 13-901.01 (Proposition 200) precludes a trial court from sentencing a defendant guilty of a first-time possession of drugs to a term in prison for violating probation. However, the trial judge sentence Mejia to prison because the judge found the underlying offense was possession for sale.

The Court of Appeals reversed, holding a plea agreement is a contract and once the trial court accepts the plea, it is bound by the terms of the agreement. Therefore, it was improper for the trial court to use the underlying facts to sentence Mejia for a crime for which he was never convicted.

***State v. Escobar-Mendez*, 289 Ariz. Adv. Rep. 14 (CA 1, 2/25/99)**

The defendant was convicted of two counts of sexual conduct with a minor. He was not charged with these offenses until after the seven year statute of limitation in A.R.S. § 13-107 had run.

The Arizona statute of limitation does not begin to run until the state actually discovers, or should have discovered, that the offense occurred. The Court of Appeals found the victim did not report the crime for over seven years because of threats by the defendant. Therefore, it was held the delay was attributable to the defendant rather than lack of diligence by the state.

***State v. Quiñonez*, 289 Ariz. Adv. Rep. 12 (CA 1, 2/25/99)**

In 1996, A.R.S. § 13-604(P) was amended to provide historical prior felony convictions will be determined by the trial judge rather than a jury. The Court of Appeals held this amendment to be constitutionally permissible.

The state alleged and proved that the offenses were both dangerous and repetitive under A.R.S. § 13-604. The Court of Appeals held the proper sentencing range was for the more severe enhancement of dangerousness rather than the enhancement for being a repetitive offense.

***State v. Fulminante*, 290 Ariz. Adv. Rep. 8 (SC, 3/4/99)**

The defendant's confession was found to be involuntary. However, the prosecutor presented it to the grand jury which indicted the defendant. The Arizona Supreme Court held evidence presented to a grand jury need not be admissible at trial.

The United States Supreme Court previously ruled the defendant was entitled to a new trial because an involuntary confession had been used in his first trial. The Court stated that without this confession it was unlikely the defendant could be prosecuted at all. The Arizona Supreme Court held this comment by the United States Supreme Court was not the law of the case and the case did not need to be dismissed for insufficiency of the evidence.

At trial, witnesses testified the murder victim had said the defendant was going to kill her. The trial judge allowed these statements under Arizona Evidence Rule 803(3), the state of mind exception to the hearsay rule.

The Arizona Supreme Court reversed, holding that the state of mind exception may be used to prove the declarant's previous or subsequent actions. However, the exception may not be used to prove the future conduct of another person. Here, the victim's statements, "he's going to kill me," directly report the victim's statement of 'belief' about the defendant's future conduct and thus violate the rule.

If this inadmissible evidence was an isolated statement it may have been harmless error. Here, it was not harmless because the Arizona Supreme Court recognized "that repeated admission of inadmissible matter may so strengthen the weight of the original admissible version that what would have been cumulative becomes conclusive and highly prejudicial."

***State v. Medina*, 290 Ariz. Adv. Rep. 19 (SC, 3/4/99)**

The defendant was sentenced to death. He and two other gang members started to steal a car radio and ended up killing the owner of the vehicle. It was held that it was improper to find pecuniary gain as an aggravating factor under A.R.S. § 13-703(F)(5). "Even if the defendant's initial intention was to take the car or radio, we cannot conclude that his motive for later running over and killing the victim was pecuniary gain."

(cont. on pg. 14) ☞

***State v. Mahaney*, 291 Ariz. Adv. Rep. 4 (CA 1, 3/16/99)**

The defendant was convicted of negligent child abuse for removing her child from the hospital against medical advice, and without the permission of Child Protective Services. The child was being treated for shaken baby syndrome.

This action was held to be sufficient to support the endangerment element under A.R.S. § 13-3623(C). "Endanger" does not require actual harm but merely that a child was subjected to potential harm.

***State v. Flores*, 290 Ariz. Adv. Rep. 34 (CA 1, 3/11/99)**

The defendant was the driver of a vehicle while the passenger was the owner of the vehicle. The defendant consented to a police search of the vehicle which turned up marijuana. There was no consent from the owner-passenger.

The Court of Appeals held the defendant-driver had authority to allow the search. Also, a ninety minute period for the search of the vehicle was held not to exceed the scope of reasonable consent.

***State v. Johnson*, 291 Ariz. Adv. Rep. 3 (CA 2, 3/16/99)**

Although the Court of Appeals normally reviews a trial court's ruling on a petition for post-conviction relief for abuse of discretion, a question of a statutory interpretation is reviewed de novo.

The defendant was convicted in 1990 of armed robbery, a class 2 felony while on probation and with one prior felony conviction. The defendant argued he should only have to serve two-thirds of his seventeen-year prison sentence, because under *State v. Tarango*, only A.R.S. § 13-604 and not the flat-time provisions of 13-604.02(B) should apply.

The Court of Appeals disagreed. The defendant was required to serve a flat-time sentence.

***State v. Smith*, 290 Ariz. Adv. Rep. 3 (SC, 2/23/99)**

The defendant was sentenced to death. The Arizona Supreme Court held the fact that the two victims were over seventy years of age was a proper aggravating factor under A.R.S. § 13-703(F)(9).

***In re: Joe S., Jr.*, 290 Ariz. Adv. Rep. 29 (CA 1, 3/9/99)**

A juvenile court judge must set a reasonable deadline for victims to claim restitution. This is required in order to avoid jeopardizing a juvenile's right to a speedy disposition and a prompt appeal.

***In re: Kristen C.*, 290 Ariz. Adv. Rep. 48 (CA 1, 3/11/99)**

Three days before her eighteenth birthday, the juvenile was ordered to pay $6,000 in restitution by her eighteenth birthday. As she did not have sufficient funds, this order became a civil judgment. The Court of Appeals held this was an appropriate order.

***In re: J. G.*, 291 Ariz. Adv. Rep. 43 (CA 1, 3/23/99)**

The juvenile was originally placed on standard probation. Although he did not violate any terms of probation, the judge modified the terms and placed the juvenile on intensive probation. The Court of Appeals held this was proper. ■

SELECTED 9TH CIRCUIT OPINIONS

By Louise Stark
Deputy Public Defender - Appeals

***United States v. Ohler*, 169 F.3d 1200 (9th Cir. (Cal.) 1999)**

Federal Rule of Evidence 609 was amended in 1990 to remove language that seemed to limit impeachment with a felony to cross examination. Our Arizona counterpart does not have any such limiting language. This court analyzes prior federal case law that partly turned on the cross examination language, but in general it holds the following. When the court rules on a contested motion *in limine*, and allows the government to impeach a defendant with a prior, the defendant waives the right to appeal this issue when she introduces the prior, drawing the sting, in direct examination.

***United States v. James*, 169 F.3d 1210 (9th Cir. (Wash.) 1999)**

In a prior opinion on this case, 139 F.2d 748 (9th Cir. 1998) a three judge panel of this court upheld James' conviction of aiding and abetting manslaughter within Indian country. That opinion is vacated, and this en banc decision reverses her conviction. She appealed the trial court's ruling preventing her from introducing extrinsic

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evidence of the victim's violent acts. James had a fourteen year old daughter and a violent boyfriend, Ogden. Both mother and daughter saw numerous instances in which Ogden had threatened and committed physical violence. They also heard him boast of numerous instances of serious assaults, one murder and other crimes. The 14 year old had successfully fought back physical attacks from Ogden in the past, even apparently delivering a beating of her own. When Ogden punched her own boyfriend unconscious, the 14 year old chased him for a while. She returned to where James sat in a truck, and obtained a gun from James with which she killed Ogden moments later, apparently while he had his hands up in surrender.

Everything the women knew firsthand, or heard Ogden boast about past violence, was admitted at trial, through their testimony, to support James' claim of self or third party defense in giving her daughter the gun. Four exhibits, extrinsic evidence confirming Ogden's boasts of prior violence and convictions, were precluded by the trial court. In the previous opinion, now vacated, this court held that the extrinsic evidence was properly precluded as not relevant to the defendant's claim of self or third party defense since she had never seen the documents, or they were inadmissible because insufficiently linked to the specific acts described in testimony. This opinion holds that the exhibits were relevant and admissible to corroborate defendant when she said Ogden claimed these acts and corroborate her testimony that she had reason to fear Ogden's violence. Both case law allowing corroboration of a key witness, and the relative probative value weighed against prejudice to the prosecution required admitting the evidence. ■

BULLETIN BOARD

New Attorneys

Myrna Parker will be joining the office on June 14 as a trial attorney. Since 1993 Myrna has been the Navajo County Public Defender. Prior to that, Myrna worked for a total of eight years, over two time periods as an attorney (and later Special Assistant) at the Maricopa County Attorney's Office. She also has been in a private criminal defense practice.

Attorney Moves/Changes

Margi Breidenbach will be moving from Group B to the EDC assignment on June 7.

Lorraine Brown, an attorney with Group B since 1997, officially left the office on April 22 and returned to New York.

Peter Claussen has resigned from the office effective May 17. He has been a trial attorney with Group D since 1993.

Karen Kaplan became the supervisor of the EDC unit on May 31.

Michelle Lawson left the office on April 2 to enter private practice. She had been a Group A attorney since 1997.

New Support Staff

Kareem Calvin started as Group B's Office Aide on May 17.

Harriet Dodge became the Office Aide for Group C on May 3.

Sandra Hamilton joined the office on May 24 as Group D's law clerk. She has recently graduated from Indiana University School of Law. While in law school, she worked as a law clerk for the Indiana State Public Defender on capital cases, and clerked for a trial court judge. Before law school she worked as a paralegal.

Tina Parker, Legal Secretary, joined Group B on May 4. She has many years previous office experience as well as a background in medical records.

Amy Sitver became the new law clerk for Juvenile on May 24. She graduated in 1997 from Gonzaga University school of Law in Spokane, WA after getting her Bachelor's degree in Broadcasting from ASU. She worked as an attorney for a firm doing contract public defense work in the Seattle area before deciding to return to Arizona.

Rebecca Stoneburner joined the office as a secretary at Durango on May 3. She has many years experience in customer service and general office work.

Cecilia Ulibarri, joined the Dependency unit as a secretary on May 24.

Support Staff Moves/Changes

Karla Carranza, Office Aide for Group B, left the office on May 10.

John Castro has been named Lead Investigator for Trial Group E. He will be joined by **Gary O'Farrell**, from

(cont. on pg. 16) ☞

Group D, **David Ames** (floater), and **Donald Souther** from Group B.

Velia Ceballos will assume the Lead Secretary position for Group E. She had previous experience as a Lead Secretary with Group D.

Malik Donahue, Administration Office Aide, left on May 18.

Chris Hyler, Records Processor Trainee, left the office on May 7.

Tammy Machelski, Group D Office Aide, left on April 9. ■

April 1999
Jury and Bench Trials

Group A

Dates: Start-Finish	**Attorney** Investigator *Litigation Assistant*	Judge	Prosecutor	CR # and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
4/1-4/1	**Pettycrew**	Fleisher	Schultz	CR 98-02132 IJP/M1	Guilty	Bench
4/1-4/5	**Valverde**	Baca	Todd	CR 99-00391 Theft of Stolen Vehicle/F2 with 2 priors	Guilty	Jury
4/6-4/7	**Flores**	Crum	Bernstein	TR 98-1698 DUI/M1	Not Guilty	Jury
4/7-4/7	**Slattery** Yarbrough *Molina*	Akers	Hunt	CR 99-00938 Agg.Asslt/F6with 1 prior, on probation	Guilty of Agg. Asslt. Prior/probation allegation dropped in exchange for bench trial	Bench
4/8-4/12	**Hernandez**	Baca	Todd	CR 98-13576 PODP/F6, POM/F6, PODD For Sale/F2 all with 2 priors on probation	Not Guilty on PODD For Sale Guilty on lesser included PODD, PODP, POM all w/1 prior	Jury
4/8-4/13	**Ryan** Brazinskas	Akers	Myers	CR 98-15311 Child Abuse/F4	Not Guilty	Jury
4/12-4/14	**Reinhardt & Palmisano** Yarbrough	Dougherty	Doering	CR 97-13474 Agg. Asslt/F3D	Not Guilty	Jury
4/14-4/14	**Glitsos**	Jarrett	Hammond	CR 98-11298 POND/F4; PODP/F6	Guilty	Bench
4/14-4/15	**Valverde**	O'Toole	Lamm	CR 99-00776 Att. POND/F5 w/1 prior while on release	Guilty	Jury
4/21-4/22	**Valverde**	McVey	Neugebauer	CR 97-05035 Agg. DUI/F4	Guilty	Jury
4/26-4/29	**Howe** Robinson	McVey	Flores	CR 97-09363 Theft/F3 Trfking Stolen Prop./F3	Guilty	Jury
4/28-5/4	**Green** *Molina*	Akers	Astrowsky	CR 98-09183 3 Cts. Sex.Expltatn of a Minor/F2	Guilty	Jury

(cont. on pg. 17) ☞

Group B

Dates: Start/Finish	**Attorney** Investigator *Litigation Assistant*	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
4/7	**Grenier**	Gottsfield	Murray	CR 98-11687 POND/ F6 PODP/ F4	Not Guilty	Jury
4/7-4/8	**Gray**	Hutt	Kalish	CR 99-00577 Agg. Assault/ F3D	Not Guilty	Jury
4/8	**Liles** Ames	Bolton	Pitts	CR 98-14670 Agg. Assault/ F6 Assault/ M1	Not Guilty Hung, then dismissed with prejudice	Jury
4/8-4/9	**Peterson**	O'Toole	Myers	CR 98-11410 Disorderly conduct/ F6	Guilty	Jury
4/12-4/13	**Agan & Ochs**	Wilkinson	Novak	CR 98-16084 Theft of Means of Transportation/ F3	Guilty	Bench
4/19-4/20	**J. Brown** King	Arellano	LeMense	CR 97-09395 PODD/ F3 Miscdt. Inv. Weap./ F4 PODP/ F6	Guilty	Jury
4/19-4/20	**Liles**	Gottsfield	Bailey	CR 98-17906 Agg. Assault/ F6	Guilty	Jury
4/26-4/30	**Gray**	Gottsfield	Davidon	CR 98-08364 POM for Sale/ F2 Transportation of Marijuana for Sale/ F2	Hung - 4/4	Jury

Group C

Dates: Start-Finish	**Attorney** Investigator *Litigation Assistant*	Judge	Prosecutor	CR # and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
3/23-4/1	**Lutgring**	Dairman	Perrin	CR 97-90332 1 Ct. Sale of Meth/ F2 3 Cts. Poss/Sale of Meth/ F2	Guilty on all counts	Jury
3/24-4/8	**Cotto** Breen *Turner*	Keppel	Click	CR 98-92215 4 Cts. Child Molest/ F2D	Not Guilty	Jury
3/30-4/2	**Walker & Klopp-Bryant** Thomas	Ellis	Rosemary Rosales	CR 98-95051 1 Ct. Theft/ F3	Guilty	Jury
4/5	**DuBiel & Alcock** Moller	Bolton	Bennink	CR 98-94386 1 Ct. Agg Assault/ F6	Not Guilty	Jury

(cont. on pg. 18) ☞

4/5-4/7	**Shoemaker**	Jarrett	Goldstein	CR 98-94303 1 Ct. Agg Assault/ F6 1 Ct. POM/ F6	Not Guilty	Jury
4/5-4/9	**Gaziano**	Dairman	Aubuchon	CR 98-92236 1 Ct. Agg Assault/ F2D	Guilty	Jury
4/6-4/15	**Ronan** *Rivera*	Keppel	Levy	CR 97-94189(B) 1 Ct. Att. 1° Murder/ F1 1 Ct. Att. Sexual Assault/ F3 1 Ct. Sex. Assault/ F2 1 Ct. Kidnap/ F4 1 Ct. Agg. Robbery/ F3D 1 Ct. Burg/ F3	Not Guilty Attempted 1° Murder Guilty on other 6 counts	Jury
4/9-4/12	**Bingham** Castro	Gottsfield	Lundin	CR 98-93554 1 Ct. Forgery/ F4	Not Guilty	Jury
4/13	**Rossi** Corbett	Jarrett	Craig	CR 98-95273 1 Ct. PODD/ F4 w/two allegeable priors	Dismissed w/o prejudice morning of trial	
4/14-4/20	**Barnes** Breen	Ishikawa	O'Neill	CR 98-93109 1 Ct. Child Molest/ F2 2 Cts. Indecent Exposure/ F6	Guilty	Jury
4/19-4/23	**Burkhart**	Keppel	Lundin	CR 98-95113 1 Ct. Armed Robbery/ F2D	Hung Jury 5 - Not Guilty; 3 - Guilty	Jury
4/19-4/23	**Sheperd** *Turner*	Aceto	Aubuchon	CR 98-94606 1 Ct. Kidnap/ F2 3 Cts. Sexual Assault/Rape/ F2 1 Ct. Agg Asslt Dangerous/ F3D 1 Ct. PODD/ F4N	Not Guilty 2 Cts. Sex Asslt Not Guilty Agg Asslt Dang Guilty Kidnap Guilty 1 Ct. Sexual Assault Guilty PODD	Jury
4/21-4/26	**Barnes & Shoemaker** Corbett	Barker	Mueller	CR 99-90439 2 Cts. Agg DUI/ F4 1 Ct. Endangerment/ F6 2 Cts. Dr. lq/drgs w/Minor/ F6	Endangerment dismissed by judge - Guilty on other four counts.	Jury
4/22	**Zazueta**	Schwartz	Arnwine	CR 98-95773 POM/ F6; PODP/ F6	Not Guilty of POM Guilty of PODP	Bench
4/23	**Dunlap-Green**	Hamblen	Anderson	TR 98-14211 1 Ct. DUI / M1	Guilty	Jury
4/23	**Zazueta**	Goodman	Brame	TR 99-00714CR 1 Ct. DUI/ M1	Guilty	Jury
4/27-4/29	**Rossi & Nermyr**	Jarrett	Vick	CR 98-95757 1 Ct. Agg DUI/ F4 1 Ct. Agg Dr/w/BAC/ F4	Ct. 1 Guilty Ct. 2 dismissed morning of trial	Jury

(cont. on pg. 19) ☞

Group D

Dates: Start-Finish	**Attorney** Investigator *Litigation Assistant*	Judge	Prosecutor	CR # and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
2/23-4/26	**Bevilacqua**	Katz	Davis	CR 97-00544 1 Ct. Agg. Assault/ F3D 1 Ct. Kidnap/ F2D	Guilty except insane	Bench
3/30-4/1	**Huls & Van Wert**	D'Angelo	Cottor/Neal	CR 98-16539 1 Ct. Mscndct Inv Weapons/ F4	Not Guilty	Jury
3/31-4/2	**Billar**	Katz	Hammond	CR 98-17277 1 Ct. Cocaine-Poss F/Sale/ F2 1 Ct. Poss. Drug Para, F6	Not Guilty of Sale, Guilty of Possession of Narcotic Drug - Lesser included and Possession of Drug Paraphernalia	Jury
4/5	**Zelms**	Anderson (Peoria J.C.)	Schultz	CR 98-03917 1 Ct. Assault / M1	Guilty	Bench
4/5 4/6	**Dwyer**	Dougherty	Neal	CR 98-11660 1 Ct. Aggravated Robbery/ F3	Not Guilty	Jury
4/5-4/6	**Billar**	Hall	Hammond	CR 98-11940 1 Ct. Poss Heroin-Poss for Sale/ F2; 1 Ct. Poss Drug Paraph./ F6	Guilty	Jury
4/6-4/7	**Bevilacqua**	D'Angelo	Farnum	CR 98-14162 1 Ct. Theft/ F3	Directed Verdict	Jury
4/7-4/12	**Varcoe & Willmott** O'Farrell	Katz	Cottor	CR 98-16889 2 Cts. Agg Asslt/ F6	Guilty	Jury
4/15-4/20	**Crews**	Katz	Neal	CR 98-17422A 1 Ct. Armed Robbery/ F2	Not guilty	Jury
4/26-4/28	**Bevilacqua**	Kamin	Eckhardt	CR 98-08703 1 Ct. Agg. Assault/ F3D	Not Guilty Agg. Asslt. Guilty misdemeanor assault	Bench
4/27-4/29	**Billar**	Reinstein	Alexov	CR 98-14595 1 Ct. Agg. Assault/ F3; 1 Ct. Agg. Assault/ F4	Guilty on both	Jury

DUI Unit

Dates: Start-Finish	**Attorney** Investigator *Litigation Assistant*	Judge	Prosecutor	CR # and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
4/15-4/27	Carrion	Reinstein, P.	Lemke	CR 98-08740 2 Cts. Agg DUI/ F4	Not Guilty of Agg DUI - Guilty of DUI	Jury
4/22	Timmer	Gottsfield	Boyle	CR 98-11971 1 Ct. Agg DUI/ F4	DR submitted, Guilty	Jury

(cont. on pg. 20) ☞

Office of the Legal Defender

Dates: Start - Finish	**Attorney** Investigator *Litigation Asst.*	Judge	Prosecutor	CR# and Charge(s)	Result [w/ hung jury, # of votes for Not Guilty/Guilty]	Bench or Jury Trial
2/5-4/6	**Taylor & Lamb** Abernethy & Pangburn *Parker*	Jarrett	Powell	CR 96-92975 3 Cts. 1° Murder / F1 2 Cts. Agg. Assault / F3D	Guilty of 1 Ct. Manslaughter, 2 Cts. 2° Murder, 1 Ct. Agg. Assault	Jury
2/16-4/16	**Hughes & Orent** Abernethy *Rubio*	Kamin	Imbordino	CR 97-11199A 1° Murder / F1, Conspiracy to Commit 1° Murder / F1, Death Penalty Notice	Ct. 1 Not Guilty Ct. 2 Not Guilty	Jury
3/15-3/15	**Canby**	Schneider	Wendall	CR 98-11384 2 Cts. Agg. Assault / F4	Ct. 1 Jdgmnt of Acquittal Ct. 2 Plea to Misd.	Jury
3/31-4/6	**Funckes**	O'Toole	Fuller	CR 98-15189 Shooting at an Occupied Structure / F3D	Not Guilty	Jury
4/1-4/5	**Ivy** Pangburn	Cole	Lundine	CR 98-94178 Theft/Poss of Stln Prop / F5	Guilty of Lesser-Included Offense	Jury
4/2-4/2	**Keilen** Horrall	P. Reinstein	Hammond	CR 98-013619 POM / F6 PODP / F6	Ct. 1 Guilty Ct. 2 Not Guilty	Bench
4/5-4/12	**Babbitt**	Arellano	Larson	CR 98-04830 Ct. 1 Armed Robbery / F2D Ct. 2 Agg. Asslt / F3D Ct. 3 Agg. Asslt / F3D	Ct. 1 Guilty of Non-Dang. Ct. 2 Guilty Ct. 3 Jdgmnt of Acquittal	Jury
4/5-4/14	**Parzych** Pangburn	Gerst	Armijo	CR 98-09675 1° Murder/ F1	Not Guilty 1° Murder Guilty of 2° Murder	Jury
4/7-4/8	**Tate**	Cole	Maasen	CR 98-05267A 3 Cts. of Sale of Narc Drug / F2	Cts. 1 & 3 Guilty Ct. 2 Not Guilty	Jury
4/21-4/22	**Keilen**	Kamin	Farnum	CR 99-01162 POND / F4 PODP / F6	Guilty	Jury
4/22-4/23	**Canby** Horrall	Gerst	Maasen	CR 98-03228 Sale of Narcotic Drug / F2	Guilty	Jury
4/26-4/29	**Canby**	Gerst	Kirchansky	CR 98-13182 Ct. 1 POND for Sale/ F2 Ct. 2 POM/ F6 Ct. 3 PODP/ F6	Guilty	Jury

SAMPLE MOTION FROM VICTIM BIAS ARTICLE
BY JEFF ROTH

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, v. XXXXXXXXXXX, Defendant.	NO. CR 98-10309 **MOTION FOR *RIGGS* HEARING TO DETERMINE IF VICTIM REFUSED INTERVIEW BASED ON BIAS, INTEREST, OR HOSTILITY** (Assigned to the Honorable SILVIA R. ARELLANO) **(Oral Argument and Evidentiary Hearing Requested)**

Defendant, XXXXXXX, by and through his undersigned attorney, hereby moves the Court to set a pretrial hearing in order to permit defense counsel to inquire as to the victim's reasons for refusing to submit to an interview with defense counsel. The purpose of this hearing is to determine whether the victim is refusing because of any bias, interest, or hostility that she may have toward the Defendant. This motion is made pursuant to State v. Riggs, 189 Ariz. 327, 942 P.2d 1159 (1997); United States' Constitutional Amendments V, XIV (Due Process) and VI (Confrontation); and U.S.Const.art. VI, clause 2 (Supremacy Clause). It is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Facts

On April 12, 1997, Defendant, Ms. XX, and a man known only as Beto left a bar together in a motor vehicle. Their car crashed into a parked vehicle resulting in injuries to Defendant and Ms. XX. Beto fled the accident scene; Ms. XX and Defendant were taken to two different hospitals. Defendant's blood was drawn at the hospital and showed that he had a 0.19 % blood alcohol level. According to the state, Ms. XX has identified Defendant as the driver of the car. Defense counsel has requested an interview with the victim; however, the state has indicated that she has refused the request.

II. **Legal analysis**

A. Sixth Amendment Right to Inquiry as to Bias, Hostility, and Interest

The United States Supreme Court has held that the "Sixth Amendment right of an accused to confront the witnesses against him is a fundamental right . . . made obligatory on the States by the Fourteenth Amendment." Smith v. Illinois, 390 U.S. 129, 130, 88 S.Ct. 748, 749; Pointer v. Texas, 380 U.S. 400, 403, 85 S.Ct. 1065, 1068 (1965). Critical to confronting witnesses is the right of cross-examination, Davis v. Alaska, 415 U.S. 308, 315-16, 94 S.Ct. 1105, 1109-10 (1974), and an important function of that right is to expose a witness' potential bias. Delaware v. Van Arsdall, 475 U.S. 673, 678-79, 106 S.Ct. 1431, 1435

(cont. on pg. 22) ☞

(1986). An accused's sixth Amendment right to confrontation is violated when a court prohibits the Defendant from "engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." Id. at 679, 106 S.Ct. at 1436 (citations omitted).

A witness's refusal to grant a pretrial interview is often relevant to the witness's credibility. As one Illinois court indicates:

> A refusal to talk in advance of trial to the other side reasonably could indicate hostility by the witness to the inquiring side, or at least a bias for, or an interest in, a favorable outcome for the side calling him. We say 'could' because triers of the fact need not invariably so conclude, but they reasonably can do so.
>
> . . .
>
> Under our present system of liberal discovery, both sides at a minimum know the witnesses who will oppose them. Admittedly, both sides have the right to attempt to interview the other's witnesses. Admittedly too, witnesses have a corollary right not to be interviewed if they so choose. But this refusal, in our opinion, can be used against them to argue bias, hostility, interest in outcome, all of which look to credibility. It is a risk the witness or his side takes. That there are reasonable inferences from such conduct cannot be gainsaid. Although not inexorable, they are reasonable. It is up to the trier of the fact to accept or reject them.

State v. Van Zile, 48 Ill.App.3d 972, 363 N.E.2d 429 (1977), cited in State v. Riggs, 186 Ariz. 573, 925 P.2d 714 (App. 1996), vacated in Riggs, 189 Ariz. 327, 942 P.2d 1159 (1997). Because a victim's refusal to grant a pretrial interview may indicate bias, and because bias is always an appropriate area for impeachment, failure to permit a meaningful inquiry would clearly violate Defendant's right to confront and cross-examine the witnesses against him. Assuming the defense can provide sufficient foundation after the Riggs' hearing, a jury should be permitted to find bias based on the victim's refusal to be interviewed.

B. Pretrial Hearing is Necessary to Establish Foundational Prerequisites to Permit Cross-Examination as to Victim's Potential Bias

The Arizona Supreme Court has held that "a victim of a crime has no blanket constitutional right to be free from questioning at trial about the victim's refusal of a pretrial interview." State v. Riggs, 189 Ariz. 327, 331, 942 P.2d 1159, 1163 (1997). Victims can be cross-examined about their refusal to be interviewed provided that the defense counsel can make a showing that the "victims refused the interviews for a reason or in a manner bearing on their credibility." Id.

The Defendant requests a hearing to determine whether this foundational "showing" can be established. Justice Feldman's dissent in Riggs correctly points out that the requisite showing cannot be made with the procedures currently in place. See Riggs, 189 Ariz. at 335, 942 P.2d at 1167 (Feldman, J., dissenting). He writes: "How can the foundation of bias or hostility be shown without first establishing the fact of refusal and then exploring the reasons for that refusal in attempting to show it was prompted by something other than the exercise of a constitutional right?" Id. Unlike other witnesses, victims are not subject to mandatory pre-trial interviews. Ariz.Const.art. II, §2.1(A)(5). Thus, defense attorneys will not know the reasons for the victim's refusal and consequently cannot make any showing that bias, interest, or hostility has tainted the victim's testimony. In other words, without a pretrial hearing, Defendant has essentially been denied a meaningful cross-examination as to a matter that could affect the witness' credibility.

For this reason, Justice Feldman posits that trial judges will hopefully "give defense counsel **wide latitude and will broadly interpret the court's foundation requirement** that 'victims refused the interviews for a reason or in a manner bearing on their credibility . . . .'" Id. (emphasis added). He concludes that **"[c]ounsel must be given some opportunity to approach the issue and explore it."** Id. citing State v. Fleming, 117 Ariz. 122, 125, 571 P.2d 268, 271 (1977) and Smith v. Illinois, 390 U.S. 129, 131, 88 S.Ct. 748, 750 (1968) (emphasis added). A brief pre-trial hearing would provide defense counsel with such an opportunity.

Indeed, Justice Moeller's majority opinion in Riggs appears to have contemplated some type of hearing to examine the presence or absence of the foundational prerequisites. See Riggs, 189 Ariz. at 331, 942 P.2d at 1163. The majority's parenthetical citation to State v. Fleming states that:

> the trial court did not abuse its discretion [in precluding defense counsel from cross-examining the state's witness about his mental problems] when Defendant failed to request a hearing and failed to show that further cross-examination would have revealed some fact that directly bore on the credibility of the prosecution's key witness.

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Id. (emphasis deleted). In essence, the majority in Riggs has determined that the defense counsel in Fleming would have been permitted to have a hearing to determine whether the witness was biased, if only it had requested one. If the hearing supplied foundation as to bias, hostility, or interest, then defense counsel would have been permitted to cross-examine the witness as to those issues.

Here, Defendant is requesting a pretrial hearing to determine if the victim's refusal is due to bias. The case for such a hearing here is even more compelling than it was in Fleming. In Fleming, the witness was a participant in the crime, rather than a victim. Consequently, defense counsel had a right to a pretrial interview to explore the potential for bias and to make an offer of proof. Here, there is no way to make an offer of proof without the hearing. In addition, unlike Fleming, the connection between the line of inquiry and its relevancy is not tenuous here. In Fleming, the defense had evidence that the witness had spent two days in a mental institution four years prior to the trial. The reviewing court had no information from which to discern the relevancy of this information. Clearly, a considerably closer connection exists in this case, where the issue is one of credibility based on her refusal to grant a pretrial interview. See Van Zile, supra at 3.

Denying this request for a pretrial Riggs hearing essentially deprives Defendant of a meaningful way to cross-examine Ms. XX as to her bias, hostility, or interest. As Justice Feldman's dissent provided and the majority suggested, he cannot make the showing required in Riggs without a hearing to examine the motives for Ms. XX's refusal to allow a pretrial interview.

C. Without Pretrial Hearing, Victim's Right to Refuse Interview Conflicts with Defendant's Sixth Amendment Right and Must Yield

If the Court determines that a pretrial Riggs' hearing is inappropriate, the sixth Amendment right to a meaningful confrontation is clearly at odds with the rights afforded victims under the Arizona Constitution. "[A] victim's state constitutional right to refuse an interview must yield when it conflicts with a Defendant's right to confront witnesses protected by the federal constitution." State v. Riggs, 186 Ariz. 573, 925 P.2d 714 (App. 1996), vacated in Riggs, 189 Ariz. 327, 942 P.2d 1159, citing Reynolds v. Sims, 377 U.S. 533, 584, 84 S.Ct. 1362, 1393 (1964) (Supremacy Clause controls conflicts between state and federal constitutions); State v. ex rel. Romley v. Superior Court, 172 Ariz. 232, 236, 836 P.2d 445, 449 (App. 1992) (Victim's Rights Act must yield to Defendant's right to due process and effective cross-examination of witnesses). Because the Defendant is effectively precluded from exploring the victim's bias without a pretrial hearing, thereby interfering with his Federal Confrontation and Due Process rights, the Court should order the victim to be subjected to a deposition so that her bias can be explored. The victim's right to refuse a deposition must yield to the Defendant's Federal Constitutional right to a meaningful cross-examination and fair trial. See United States' Constitution, Amendments V, XIV, and VI; U.S.Const.art. VI, clause 2 (Supremacy Clause).

CONCLUSION

For the foregoing reasons, the Defendant asks for a pretrial hearing to determine whether the victim refused defense counsel's request for a pretrial interview on account of any bias, hostility, or interest. If this Court finds a pretrial hearing to be inappropriate, the Defendant submits that the victim's rights under Arizona law conflict with the Federal constitution. Therefore, the victim's right to refuse a pretrial interview must yield to the Defendant's Sixth Amendment right to meaningful confrontation.

RESPECTFULLY SUBMITTED this ____ day of March, 1999.

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